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No. 91-1838

In The

Supreme Court of the United States

October Term, 1991

GARY LEE ROCK,

Petitioner,

vs.

LEROY S. ZIMMERMAN; JOHN F. NELSON,
District Attorney,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER A MAJORITY OF THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE ALLEGED IMPROPER JURY INSTRUCTION CONSTITUTED HARMLESS ERROR.

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STATEMENT OF THE CASE

In the months preceding the fatal events of July 2, 1977, Gary Rock had been depressed and suicidal. On the night preceding the murders, he became extremely upset when he saw a woman that he had once dated with another man at a party. The next morning, he left his rural home to drive to Chambersburg, Pennsylvania, to purchase rifle and shotgun shells. On returning home, he sighted in his scoped, high-powered rifle. He dressed in combat boots and fatigues, and armed himself with spare cartridge magazines and full canteens that he would later use in his escape from the crime scene. He systematically poured gas throughout various rooms of his house and in an adjoining shed. He then ignited the gas and armed with his deadly weapons, awaited the arrival of his neighbors and members of the volunteer fire department he knew would respond.

Rock's first victim was his neighbor who was felled by a bullet from Rock's .300 Savage which struck him in the heart. The next person on the scene was the Fire Chief of the Fayetteville Fire Department. As he exited his vehicle while radioing for assistance, the Chief was fatally shot in the head by Rock, once again using the .300 Savage rifle.

A minute or so later the first fire truck arrived at the scene and Rock once again opened fire, grouping several shots in the front windshield of the truck. These shots narrowly missed the driver but seriously wounded a fire fighter seated behind the cab of the truck. None of the other fire fighters occupying the truck were injured.

Rock fled into the mountains where he was captured several hours later. He asked his captors how many people he had killed, indicating that he had seen two fall.

Rock was convicted in Franklin County in May 1978 of two counts of first degree murder and six counts of attempted murder. The Supreme Court of Pennsylvania affirmed the Judgment of Sentence. In 1984, the United States District Court granted a Writ of Habeas Corpus on the grounds of ineffective assistance of trial counsel. *U.S. ex rel. Rock v. Zimmerman,* 586 F.Supp. 1076 (M.D. Pa. 1984).

At his new trial in January 1985, a jury once again rejected Rock's mental infirmity defense and found him guilty of two counts of first degree murder, four counts of attempted murder and two counts of aggravated assault. These convictions were sustained by the Pennsylvania Superior Court and the Pennsylvania Supreme Court denied a Petition for Allowance of Appeal. The United States District Court for the Middle District of Pennsylvania denied the Petition for Writ of Habeas Corpus and denied probable cause to appeal. On August 23, 1990, the Third Circuit Court of Appeals denied a Certificate of Probable Cause. Upon Petition for Rehearing, the Order denying the Certificate of Probable Cause was vacated on October 29, 1990. On August 8, 1991, a panel of the Court of Appeals, in a two to one decision, ruled that the District Court had erred in not granting the Writ of Habeas Corpus. A timely petition for rehearing en banc was granted, and on March 24, 1992, by an eight to two majority, the Third Circuit affirmed the denial of the writ.

REASONS FOR DENYING THE WRIT

A. THE TRIAL COURT'S INSTRUCTIONS, WHEN VIEWED IN THEIR ENTIRETY, ADEQUATELY EXPLAINED OR CURED ANY PORTIONS OF THE CHARGE WHICH WERE OBJECTIONABLE.

Although the majority opinion of the Circuit Court acknowledged that the complained of instructions were both prefaced and followed by explanatory instructions, that court nonetheless found the jury instruction unconstitutional. It is respectfully suggested that an independent review of the jury instructions by Your Honorable Court would lead to a different conclusion.

It is undisputed that certain portions of the trial court's instructions were couched in terms that could be deemed to give rise to a mandatory presumption which improperly shifted the burden of proof from the Commonwealth to the defendant. *Francis v. Franklin,* 471 U.S. 307 (1985). Nevertheless, as stated in *Franklin,* a review of the entire charge is necessary to determine whether the instructions as a whole clarified the State's burden of proof. The Circuit Court decision failed to properly analyze the explanatory portions of the charge that followed the improper language and furthermore they erred in virtually disregarding the general instructions the court gave which were lengthy and repeated and consistently reaffirmed the Commonwealth's burden of proving all elements of the offenses.

Your Honorable Court in *Sandstrom v. Montana,* 442 U.S. 510 (1979) and *Francis v. Franklin,* supra, specifically noted that in those cases the jury was never told that they had an option whether to accept the presumption or

inference explained by the court. In *Franklin,* the Opinion specifically noted that the otherwise improper instruction may have been rendered permissible if it had been followed with qualifying or explanatory language which properly explained the presumption if such explanation was prefaced by language such as "this means that". The Circuit Court decision apparently overlooks the fact that *immediately* following the complained of portion of the charge, the court summarized and explained the presumption in most satisfactory terms.

> "In other words, members of the jury, *you may if you see fit,* find an intent to kill existed from the fact that the defendant did use the .300 Savage rifle . . . These things *you may, if you see fit,* consider in determining whether or not there is an intent to kill." (emphasis added).

This paragraph, following on the heels of the complained of instruction, is not simply contradictory, but is clearly explanatory and curative as envisioned by *Francis.* In *Hill v. Maloney,* 927 F.2d 646 (1st Cir. 1990), the First Circuit concluded that the language "and therefore" prefacing a summary of previous instructions is considered explanatory in nature and would likely be considered as such by a jury. The trial court's instructions, prefaced by "in other words" were clearly explanatory in nature, not contradictory.

The Court of Appeals discounts the explanatory and qualifying language contained in the supplemental jury instruction given in response to the jury's questions. The trial court's response to those questions contained language that would appear to be the impermissible burden shifting language similar to that in *Franklin.* However, as

suggested in the *Franklin* decision, that instruction was immediately followed by a detailed and proper explanation prefaced by the words "so what the law is on the subject". The judge then went on to explain his previous instruction in clearly permissive language "then it is proper for you to apply this presumption if you see fit and if it is not rebutted in any other way". The case at bar is easily distinguishable from *Franklin,* wherein the explanatory language was totally absent and the jury was never told it had a choice whether to accept the inference.

A review of the instructions in their entirety, the general instructions given by the court concerning the constant burden of proof on the Commonwealth together with the explanatory language suggested in *Franklin* and *Carella v. California,* 491 U.S. 271 (1989), leads to the conclusion that no reasonable juror could have concluded that they were required to accept the presumption or inference upon the proof of the predicate facts. Consequently, the court's charge does not violate holdings of *Sandstrom* and *Franklin.*

B. VIEWING THE EVIDENCE IN ITS ENTIRETY AND WEIGHING ITS PROBATIVE VALUE VERSUS THE EFFECT OF ANY IMPROPER INSTRUCTION MUST BE DEEMED TO BE HARMLESS ERROR.

Even if the Court of Appeals decision that the instructions violated due process is correct, notwithstanding the qualifying instructions contained in the case at bar, a harmless error analysis is clearly proper. *Rose v.*

Clark, 478 U.S. 570 (1986). Counsel for Petitioner attempts to rely on the Commonwealth's failure to make a harmless error argument at the post verdict motions stage. Those proceedings took place prior to *Rose v. Clark*, supra, which made it clear that a harmless error analysis is proper in *Sandstrom* cases.

In *Yates v. Evatt*, 111 S.Ct. 1884 (1991), Your Honorable set forth a two-step process to be followed in making the harmless error inquiry. The first step is to evaluate what evidence was considered by the jury in addition to the predicate facts. This determination must be made from an analysis of the court's instructions. There can be absolutely no doubt that the jury in this case was instructed repeatedly to consider all of the evidence in the record, not just those necessary to give rise to a presumption. The second step requires the court to weigh the probative force of that evidence against the probative force of the presumption standing alone.

Mindful of the mandates of *Yates*, the Circuit Court conducted a harmless error analysis. In so doing, the Court kept in mind the requirement that it assume that jurors carefully follow instructions. *Francis v. Franklin*, supra. By a majority of eight to two, the Court of Appeals found that any error was indeed harmless. In reviewing the Court's harmless error analysis it is extremely important to recognize that the jury was clearly instructed that before they could consider the inference of intent, they first had to find an *intentional* use of a deadly weapon on the vital part of another person's body, and that they could only find such intent if they found the Commonwealth had proven Rock sane beyond a reasonable doubt. Petitioner tends to lump together the concepts of sanity

and intent and argues that if there was an issue concerning sanity, evidence of intent could never be overwhelming. Clearly though, it is appropriate to analyze the evidence with respect to the separate concepts of sanity and intent. *Godfrey v. Kemp*, 836 F.2d 1557 (11th Cir. 1988).[1]

As pointed out by the Court of Appeals, since the jury is presumed to follow the court's instructions, it could not have even considered the deadly intent instructions without first having reached a conclusion as to Rock's sanity. No error is alleged with respect to any of the instructions concerning sanity and clearly, as pointed out below, the Commonwealth must be deemed to have met its burden of proving sanity beyond a reasonable doubt. Assuming as we must that the jury so concluded, the evidence demonstrates, inter alia, the following.

In the months preceding the killings, Rock had been depressed and angry. He had at one point been suicidal. He was bitter about the fact that he had spent time in the Marine Corps but had emerged with no vocational training.[2] He was upset with his job, which he referred to as

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[1] Although harmless error was not found in *Godfrey v. Kemp*, the questioned jury instructions clearly lack the permissive language contained in Judge Keller's charge. Furthermore, unlike the case at bar, that jury was told there was a presumption of sanity which they could consider in deciding the issue of intent.

[2] Rock is a Vietnam *era* veteran. He served his entire enlistment in the United States. This is relevant only to the extent that trial counsel suggested to the jury that his actions were somehow the result of a flashback to his military days, though he saw no combat.

"women's work", and was frustrated over his inability to gain a promotion. He could not seem to develop a lasting relationship with a woman.

The night before the killings, he was at a friend's party. There he saw a woman he liked with another man. Though he had only dated this woman once or twice, he became upset with the fact she was there with someone else. He went out to his truck and cried. This appears to have been the last straw.

Upon awakening the next morning, he drove to town to buy .12 gauge shotgun shells and .300 Savage cartridges. Not coincidentally, he eventually, after the shootings, carried a .300 Savage and a .12 gauge shotgun into the mountains. When he arrived back home, he sighted in his scoped, high-powered rifle. He dressed in combat boots and fatigues, and prepared for what was to come by putting the shells into cartridge magazines and getting canteens that he could take into the mountains. Thus prepared, he decided to set fire to his house, and systematically poured gas in various rooms and an adjoining shed. He then ignited the gas, and, armed with his rifle and shotgun, awaited the arrival of the help he knew would come.

As Rock, a trained expert Marine Corps marksman, waited, his neighbor, Wilbur Brookens, rushed to assist him. As Brookens approached the burning home, Rock shot him dead with a single shot of his .300 Savage. The bullet struck Brookens in the base of the heart. Next on the scene was Fayetteville Fire Chief James Cutchall. Apparently seeing Brookens' body, he pulled his vehicle off the lane leading to Rock's home, and began to radio

for an ambulance, at the same time exiting his vehicle. He was fatally shot in the head by Rock, once again with the .300 Savage.

A minute or so passed before the first fire truck arrived. As the truck pulled to a halt near the two bodies, Rock fired several tightly grouped shots through the front of the truck, narrowly missing the driver, but seriously wounding Scott Reichenbach, a firefighter seated behind the cab of the truck. Shortly thereafter, Rock, armed with his rifle, shotgun, and carrying canteens, fled into the wooded mountains behind his home.

When he was surrounded in a remote area several hours later, he wanted to know how many people he had killed, indicating he had seen two fall.

Assuming, as one must, that the jury concluded Petitioner to be legally sane, the foregoing evidence is clearly dispositive of intent whether the jury relied on the questioned instruction or not. The question is not whether the jury in fact relied on the presumption, as no reviewing court can retrace the jury's actual deliberative process. The question to be answered is "whether the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction, this verdict would have been the same". *Pope v. Illinois*, 481 U.S. 497 (1987) (footnote 6). It is respectfully submitted that the evidence heretofore recited leaves no doubt, assuming the jury was convinced of Rock's sanity, that he had the fully formed intent to kill.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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